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No. 05 - 7058

IN THE

Supreme Court of the United States

Supreme Court, U.S.
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Lorenzo L. Jones,

Petitioner,

v.

Barbara Bock et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case presents two questions: (1) whether the Prison Litigation Reform Act ("PLRA"), Pub. L. 104-134, 110 Stat. 1321 (1996), requires a prisoner plaintiff to attach proof of administrative exhaustion to his or her complaint or, in the absence of such documentary proof, to explain with particularity how his or her administrative grievances were exhausted; and (2) whether the presence of one or more unexhausted claims requires a federal court to dismiss the prisoner's civil rights action in its entirety without leave to amend. Respondents do not dispute that the federal courts of appeals are intractably divided over the questions presented. Respondents do not dispute that the questions presented recur with great frequency and are important. Respondents do not dispute that this case is an appropriate vehicle to resolve the questions presented. Having not rebutted any of the reasons articulated in Rule 10 of this Court for granting certiorari, respondents' nevertheless argue that certiorari should be denied because the court of appeals correctly decided the case below.

For the reasons articulated in the petition, in petitioner's supplemental brief, in the *amici* brief of D.C. Prisoners' Legal Services Project Inc. *et al.*, and in this reply brief, the petition merits this Court's review and rejection of respondents' premature and misplaced merits-based arguments.

A. This Petition Presents Two Square Circuit Conflicts Meriting this Court's Review

Respondents do not dispute that the court of appeals' decisions on both questions presented squarely conflict with those of other circuits. *See* BIO at 1, 8. Although respondents do not dispute our presentation of the split over the first question presented – the "plead and show exhaustion" question – *compare* Pet. at 11-15 *with* BIO at 1-8, they contend that the conflict over the second question presented – the "total exhaustion" question – is "is not as wide as Petitioner suggests," BIO at 8-9; *see also id.* at 10. In particular, respondents note that, while the Fifth and Seventh Circuits have "indicated that an exhausted claim might proceed despite the complaints including an unexhausted claim," neither circuit

has "expressly accepted or rejected total exhaustion." BIO at 9. We will not quibble with respondents over whether the Fifth and Seventh Circuits have conclusively ruled on the question.

Whether the split is characterized as a 3-1-4[1] or 3-1-2[2] split is irrelevant to the need for this Court to promptly resolve the courts of appeals' disagreement over the "total exhaustion" issue. First, the inter-circuit conflict is well-recognized, entrenched, and shows no signs of resolving itself. The circuit split is well-recognized. *See, e.g., Lira*, 427 F.3d at 1170 (surveying split and noting "conflicting results"); *Beltran v. O'Mara*, 405 F. Supp. 2d 140, 156-57 (D.N.H. 2005) (cataloguing split). The circuit split is entrenched and shows no signs of resolving itself. For example, both the Sixth and Ninth Circuit – the two courts of appeals to have most recently published decisions on the issue and whose decisions fall on opposite sides of the inter-circuit conflict – each denied rehearing en banc on the issue.[3] Moreover, the Second, Sixth, Eighth, Ninth, and Tenth Circuits all continue to apply their prior published decisions on the "total exhaustion" issue to new cases.[4]

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[1] Under this presentation of the split, the Third, Sixth, and Tenth Circuits apply a strict "total exhaustion" requirement, *see Jones Bey v. Johnson*, 407 F.3d 801, 805 (CA6 2005), *cert. filed* 74 U.S.L.W. 3424 (Jan. 9, 2006) (No. 05-874); *Vasquez v. Ragonese*, 142 Fed. Appx. 606, 606 (CA3 2005), *cert. filed* (Nov. 22, 2005) (No. 05-8894); *Ross v. City of Bernalillo*, 365 F.3d 1181, 1189 (CA10 2004), the Eighth Circuit falls in the middle by allowing prisoner plaintiffs to avoid dismissal of their entire complaint by allowing them to amend their complaints and delete any unexhausted claims, *see Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (CA8 2003), and the Second, Fifth, Seventh, and Ninth Circuits apply a partial exhaustion rule that allows a district court to dismiss only unexhausted claims, *see Lira v. Herrera*, 427 F.3d 1164, 1170 (CA9 2005), *cert. filed* 74 U.S.L.W. 3425 (Jan. 6, 2006) (No. 05-878); *Johnson v. Johnson*, 385 F.3d 503, 533 (CA5 2004); *Ortiz v. McBride*, 380 F.3d 649, 656-63 (CA2 2004), *cert. denied*, 125 S. Ct. 1398 (2005); *Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003).

[2] This presentation of the circuit split is the same as that presented *supra* at fn. 1, except that it presumes that the Fifth and Seventh Circuits have not yet chosen a side.

[3] The Sixth Circuit denied rehearing en banc in *Jones Bey* on October 13, 2005, and the Ninth Circuit did the same in *Lira* on December 13, 2005. This information is verifiable on the public PACER dockets for these cases. Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them.

[4] Most recently, the Second Circuit applied *Ortiz* in *Dukes v. Dep. Supt. of Sec. A*, 153 Fed. Appx. 772, 773 (CA2 2005), the Sixth Circuit applied *Jones Bey* in the cases below, the Ninth Circuit applied *Lira* in *Del Raine v. Femme*, No. 03-57045, 2006 WL 64134, *1 (CA9 Jan. 9, 2006), the Eighth Circuit applied *Kozohorsky* in *Harris v. Kemna*, 155 Fed. Appx. 941, 941 (CA8 2005), and the Tenth Circuit applied *Ross*'s "total exhaustion" rule in *Strope v. McKune*, No. 05-3344, 2006 WL 246138, *1 (CA10 Feb. 2, 2006).

Only this Court can bring needed uniformity to the questions presented, and as we show *infra* at pp. 3-6, the need for this Court's intervention is urgent.

B. The Questions Presented Recur with Great Frequency and Are Important

Respondents do not dispute that the questions presented recur with great frequency and are important. As explained in the petition, prison civil rights suits outnumber every other kind of civil suit, including federal petitions for writs of habeas corpus. *See* Pet. at 10. We noted in the petition that "[t]he first question presented involves an issue relevant to every one of the over 20,000 PLRA complaints filed each year because the issue affects how every PLRA plaintiff in the country must plead their prison condition claims." *Id.* Respondents argue that "this is an exaggeration" because "substantially fewer than all of the approximately 20,000 prisoner cases filed each year are affected by this pleading requirement." BIO at 1. With all due respect to respondents and their able counsel, this argument is nonsensical. In the three circuits that require a prisoner to do so – the Sixth, Tenth, and Eleventh Circuits – a prisoner's failure will result in dismissal. In the seven circuits that reject such a requirement – the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits – a motion to dismiss by prison officials on the basis that the prisoners failed to plead and show exhaustion will be rejected as being foreclosed by binding circuit precedent. Whether a prisoner must plead and show exhaustion in his or her complaint certainly affects every single PLRA complaint filed in the nation's federal courts.

With respect to the second question presented, we conceded in the petition that we know of no statistics indicating the percentage of the over 20,000 prison civil rights suits filed each year that involve that question. *See* Pet. at 10. Nevertheless, we noted that the number must be immense because the question presented is involved in some percentage of the most pervasive type of suit filed in the Nation's federal courts. *See id.* Our research into developments post-dating the filing of this petition confirms our suspicion. In the four months since this petition was filed on October 13, 2005, at least forty-two

district court decisions have passed on the second question presented.[5] *See* App., *infra*, at 1a-3a. Thirty-three of those decisions have applied the "total exhaustion" rule to dismiss the entirety of a prisoner's complaint without leave to amend because the complaint contained at least one unexhausted claim. *See id.* at 1a-2a. Nine of the forty-two district court decisions have refused to apply the "total exhaustion" rule. *See id.* at 2a-3a.

The incredible frequency with which these issues arise and the persistence with which district courts resolve these issues inconsistently confirm that the federal courts are in disarray over how to apply the PLRA to the questions presented. Indeed, aside from the recent challenges to the constitutionality of the federal sentencing guidelines, we can conceive of no other legal issues which have so frequently divided the federal courts. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari to resolve "disarray among the Federal District Courts" over the constitutionality of the federal sentencing guidelines); *see also generally United States v. Booker*, 125 S. Ct. 738 (2005) (similar). This Court's resolution of these divisions is most urgently needed.

Even if the issues did not recur with such great frequency, this Court's intervention would still be warranted because of the importance of the issues at stake. As explained by *amici*, "[p]risoners have a constitutional right of access to the courts" to obtain relief on complaints related to imprisonment. *Amici* Br. at 3 (quoting *Bounds v. Smith*, 430 U.S. 817, 821 (1977)). One of the vehicles through which they may exercise this right is a federal civil rights action. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004)

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[5] We include in an Appendix to this reply brief a list of citations to district court decisions that have passed on the "total exhaustion" issue. We emphasize that our numbers are necessarily under-inclusive. Although most of the cases cited in the Appendix are unreported decisions that are nonetheless available on Westlaw, most district court decisions are never released to Westlaw. A quick survey of the cases cited in the Appendix confirms this fact, as the overwhelming majority of the decisions cited in the Appendix come from the Western District of Michigan.

The abundance of cases from the Western District of Michigan – which is within the Sixth Circuit and must apply its law – also explains why, notwithstanding that the Sixth Circuit's interpretation of the "total exhaustion" issue falls on the minority side of the circuit splits, we have found so many more district court decisions consistent with the Sixth Circuit's interpretation. Because the Sixth Circuit falls on the minority side of the split over this issue, we suspect that, if all of the Nation's district court decisions were available on Westlaw, a majority of district court decisions would reject the Sixth Circuit's view.

(per curiam). In the decision below, the court of appeals imposed "judicially-created impediments [that] have transformed the constitutional right of access to the courts into a complicated maze of traps for prisoners who seek to vindicate their rights." *Amici* Br. at 7. And, as we explain *infra* at pp. 7-15, these judicially-imposed impediments find no support in the PLRA's text, structure, or underlying policy goals.

Respondents assert that the dismissal without prejudice that results from the application of these judicially-imposed impediments "obviously [do] not prejudice[]" prisoners because they "can bring their action again," BIO at 1, and because any statute of limitations "is tolled while the inmate exhausts administrative remedies [and] from the date of service on the defendant, until the dismissal without prejudice," BIO at 8. Respondents' assertion assumes too much. It is by no means certain that the statute of limitations will be tolled during exhaustion absent an applicable tolling rule in the forum state.[6] And at least one court has held that "the pendency of a grievance • • • does not toll the running of the limitations periods." *Thomas v. Henry*, No. 02 CIV.2584 SJR DFE, 2002 WL 922388, *2 (S.D.N.Y. May 7, 2002) (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980)). Nor is it clear that the time that a PLRA case is pending in federal court will toll the statute of limitations.[7] Indeed, one court of appeals decision has held that it will not. *See Long v. Simmons*, 77 F.3d 878, 880 (CA5 1996) (holding that dismissal without prejudice after limitations period expired operated as dismissal *with* prejudice). Additionally, even if a prisoner's case is not time-barred, many will still be precluded or

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[6] For example, in *Brown v. Morgan*, 209 F.3d 595 (CA6 2000) – the case relied on by respondents for the proposition that the limitations period will always be tolled during exhaustion, *see* BIO at 8 n.26 – the court, without any analysis, simply cited to *Harris v. Hegmann*, 198 F.3d 153 (CA5 1999), which relied explicitly on state tolling law. *Brown*, 209 F.3d at 596 (citing *Harris*, 198 F.3d at 157-58). Subsequent decisions have relied on or at least cited state law. *See Johnson v. Rivera*, 272 F.3d 519, 521 (CA7 2001); *Leal v. Georgia Dep't of Corr.*, 254 F.3d 1276, 1280 (CA11 2001) (assuming that state law provides the tolling rule); *Wisenbaker v. Farwell*, 341 F. Supp. 2d 1160, 1164-65 (D. Nev. 2004) (applying "best judgment" about application of state equitable tolling law); *Howard v. Mendez*, 304 F. Supp. 2d 632, 636 (M.D. Pa. 2004) (applying state tolling rules to a case involving a federal prisoner); *McCoy v. Goord*, 255 F. Supp. 2d 233, 253 (S.D.N.Y. 2003) (noting in dictum that time spent exhausting appears to be tolled under New York law); *Roberts v. Saunders*, No. Civ.A.7:02-CV-00808, 2003 WL 23678921, *1 (W.D. Va. Jan. 10, 2003).

[7] To this end, it is no surprise that respondents do not cite a single authority for their assertion that the limitations period will be tolled while a prisoner's PLRA case is pending in federal court.

deterred from refiling their properly exhausted claims because "re-filing an action would require an additional filing fee," *Jones Bey*, 407 F.3d at 808, and for those prisoners no longer eligible for *in forma pauperis* status by operation of the PLRA's "three strikes" provision, the entire filing fee would be due at the inception of their re-filed action.[8] Many prisoners – like petitioner, *see* Pet'r IFP Application – are unable to pay an additional filing fee up front and, consequently, will be out of court while their claims become stale. "[I]mposition of such barriers with regard to properly brought claims * * * risk * * * precluding meritorious, fully exhausted claims," *Lira*, 427 F.3d at 1175, in violation of prisoners' "constitutional right of access to the courts," *Bounds*, 430 U.S. at 821.

Ensuring that prisoners' constitutional right of access to the courts is not unnecessarily impeded – particularly in light of the courts of appeals' disagreements over the propriety of such impediments – is a compelling reason for this Court to grant certiorari. When coupled with the frequency with which questions over these impediments recur, the need for this Court's intervention becomes dire.

C. This Petition Is An Appropriate Vehicle to Decide the Questions Presented

Respondents do not dispute that this Petition is an appropriate vehicle to decide the questions presented.[9] Indeed, respondents would be hard-pressed to do so because resolution of the questions in petitioner's favor would revive his claims against respondents Morrison and Opanasenko and require the court of appeals to evaluate his challenges to the district court's dismissal of his claims against respondents Bock and Chaplin and defendants Konkle and Aldabaugh for failure to state a claim. *See* Pet. at 15-16.

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[8] "'Strikes' are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed 'on the ground that [they were] frivolous, malicious, or fail[ ] to state a claim. * * * Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed'" *in forma pauperis*. *Andrews v. King*, 398 F.3d 1113, 1116 n. 1 (CA9 2005).

[9] Additionally, we note that, since the petition was filed, this Court granted certiorari in *Woodford v. Ngo*, 126 S. Ct. 647 (2005) (No. 05-416). As we explained in our supplemental brief, the question presented in *Ngo*, which has nothing to do with how PLRA complaints must be pleaded or whether unexhausted claims may be joined in a single action with exhausted claims, will not resolve the issues presented in this case. *See* Supp. Br. at 3 n.2.

Additionally, it is of no moment that the court of appeals' decision below was unpublished and relied on prior circuit precedent because "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). This Court has frequently granted review of unpublished decisions, and those cases frequently involve situations, such as the situations here, where a court of appeals applied prior circuit precedent in an unpublished decision. *See, e.g., MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (granting review of short unpublished *per curiam* order holding that prior circuit precedent "conclusively" determined the outcome of the case).

Further underscoring the notion that the court of appeals' decision to not publish the decision below is irrelevant to this petition's suitability for review is the fact that district courts within the Sixth Circuit have repeatedly relied on the decision below for its precedential value, even though it was unpublished.[10]

D. The Decision of the Court of Appeals Cannot Be Reconciled with This Court's Decisions or the PLRA's Statutory Text, Structure or Underlying Policy Goals

Respondents' primary opposition to the petition is its argument that the court of appeals correctly decided the case below. Neither of the court of appeals' holdings can be reconciled with this Court's decisions or the PLRA's statutory text, structure, or underlying policy goals.

1. The Sixth Circuit's "Plead and Show Exhaustion" Rule Is Contrary to This Court's Prior Decisions, Federal Rule of Civil Procedure 8(a), and the PLRA's Statutory Text

As *amici* have persuasively demonstrated, the heightened pleading standard applied by the court of appeals to justify dismissal of petitioners' complaint "is irreconcilable with this Court's decisions that

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[10] *See Stanley v. Samuels*, No. Civ.A. 05CV477KKC, 2006 WL 269943, *6 (E.D. Ky. Feb. 2, 2006); *Stubbs v. Nalley*, No. Civ.A.6:05-567-DCR, 2006 WL 197055, *3 (E.D. Ky. Jan. 20, 2006); *Marsh v. Price*, No. Civ.A. 05-CV-277-JMH, 2005 WL 3118121,*5 (E.D. Ky. Nov. 21, 2005); *Gross v. Clay County Fiscal Court*, No. Civ.04-505-JBJ, 2005 WL 236526, *3 (E.D. Ky. Sep. 26, 2005); *White v. Harris*, No. Civ 04-265-KKC, 2005 WL 2266658, *2 (E.D. Ky. Sep. 16, 2005); *Wilson v. Wilson*, No. Civ.A. 6:05-200-DCR, 2005 WL 2043064, *4 (E.D. Ky. Aug. 24, 2005); *Chaney v. Catron*, No. Civ.A. 605324-DCR, 2005 WL 1801711, *3 (E.D. Ky. July 25, 2005).

Unlike some other circuits, the Sixth Circuit allows its district courts and litigants to cite to unpublished decisions as precedent. *Compare* CA6 R. 28(g) *with, e.g.*, CA9 R. 36-3.

prohibit judicially-created pleading requirements * * * and [Federal] Rule [of Civil Procedure] 8(a)'s liberal notice pleading standard." *Amici* Br. at 9-14 (discussing Fed. R. Civ. P. 8(a), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)). Respondents' primary response is the bold argument that the PLRA's pre-service screening provision, 28 U.S.C. § 1915A, conflicts with and, therefore, impliedly repealed and supercedes Federal Rules of Civil Procedure 8 and 15 with respect to prison civil rights complaints. *See* BIO at 2-8. In doing so, they recognize – as they must – that "[i]t is * * * a cardinal rule of statutory construction that repeals by implication are not favored * * * [and that] the intention of the legislature to repeal must be clear and manifest." BIO at 4-5 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). "Where there is no clear intention" to repeal or supercede, one statute will not be given priority over another statute or Rule, "regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Critically, respondents have not shown – indeed, cannot show – that § 1915A's statutory text, operation, or legislative history evidence a "clear intention" to repeal or supercede Rules 8 and 15.

This Court has acknowledged "two well-settled categories of repeals by implication." *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower*, 426 U.S. at 154). "An implied repeal will only be found [1] where provisions in two statutes are in irreconcilable conflict, or [2] where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citations omitted). Section 1915A and Rules 8 and 15 are not in "irreconcilable conflict." *Id.*

> It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." * * * "Repeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes."

Radzanower, 426 U.S. at 155 (quoting *Morton*, 417 U.S. at 551; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

Here, the basic purposes of the PLRA and its screening provision can be fairly served by giving full effect to Rules 8 and 15. The PLRA's screening provision, as its text states, is designed to allow prompt dismissal of a suit that is "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A. These considerations necessarily go to the *merits* of a claim as pleaded by the prisoner plaintiff. Nowhere does § 1915A or its legislative history indicate that district courts are supposed to pre-screen and dismiss for failure to exhaust administrative remedies. Indeed, PLRA § 1997e(c), the provisions of which govern both early dismissal and exhaustion of administrative remedies, expressly distinguishes the § 1915A early dismissal grounds from dismissal for failure to exhaust administrative remedies. *See* 42 U.S.C. § 1997e(c)(2) ("In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim *without first requiring the exhaustion of administrative remedies*." (emphasis added)).

There is no conflict between § 1915A and Rule 8 and 15 because, when § 1915A is properly read, all it requires is that a prisoner plaintiff plead "a short and plain statement," Fed. R. Civ. P. 8(a), establishing that his or her claim is not "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief," 28 U.S.C. § 1915A. Nor is there any conflict between § 1915A and Rule 15 because, when § 1915A is properly read, "leave [to amend] shall be freely given," Fed. R. Civ. P. 15(a), when the prisoner plaintiff's claims are not "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief," 28 U.S.C. § 1915A. Since it is possible for § 1915A and Rules 8 and 15 "to coexist in this manner," – indeed, the

majority of circuits have found no irreconcilable conflict between § 1915A and Rules 8 and 15, *see* Pet. at 13-14 – "they are not so repugnant to each other to justify a finding of an implied repeal by this Court." *Radzanower*, 426 U.S. at 156-57; *see also Kremer*, 456 U.S. at 471 ("Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between [two provisions in apparent tension] is enough to end [this Court's] inquiry.").

Nor does Congress' enactment of § 1915A fall within the second category of repeals by implication because § 1915A does not "cover[] the whole subject of," *Radzanower*, 426 U.S. at 157, federal pleading procedure. Perhaps even more importantly, respondents' repeal by implication argument must fail because respondents do not establish, under either test, that Congress "clear[ly] and manifest[ly]" intended to repeal Rules 8 and 15's applicability to PLRA suits. Neither the PLRA itself nor its legislative history indicates an intent – much less, even mentions – Rule 8 or Rule 15.

Once respondents' bold repeal by implication argument is properly rejected – as it must be – it becomes evident that, by requiring prisoner plaintiffs to plead and show exhaustion with their initial federal complaint, the court of appeals improperly ignored *Leatherman*'s and *Swierkiewicz*'s holdings that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions" not applicable here. *Swierkiewicz*, 534 U.S. at 513 (referring to *Leatherman*).[11]

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[11] Respondents attempt to distinguish *Swierkiewicz* on the basis that it was an employment discrimination case in which the court of appeals required the plaintiff to plead facts establishing a prima facie case of discrimination under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), framework. *See* BIO at 6. Respondents argue that, unlike the *McDonnel Douglas* framework, the PLRA requires prisoner plaintiffs to plead exhaustion. *See* BIO at 6-7. This attempt to distinguish *Swierkiewicz* founders on its premise. As shown elsewhere in this reply brief, *supra* at p. 9 & *infra* at p. 11, the PLRA does not require prisoner plaintiffs to plead exhaustion. *See, e.g.*, 42 U.S.C. § 1997e(c)(2) ("In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim *without first requiring the exhaustion of administrative remedies*." (emphasis added)).

2. The Sixth Circuit's "Total Exhaustion Rule" Is Inconsistent with the PLRA's Statutory Text, Structure, and Underlying Policy Goals

Respondents assert that the court of appeals' "total exhaustion rule" "is consistent with the text of the statute." BIO at 10. In doing so, they argue that, because the PLRA's exhaustion provision, 42 U.S.C. § 1997e(a), states that no "action" shall be brought in federal court until administrative remedies have been exhausted, but the subsection prescribing rules for dismissal refers to "actions" or "claims," *id.* § 1997e(c)(1) & (2), Congress intended that prisoners exhaust administrative remedies on all claims before commencing an action. *See* BIO at 10-11. Contrary to respondents' argument and the court of appeals' holding below, in three respects, § 1997e(c) indicates that district courts need not dismiss an entire action without leave to amend because of the presence of one unexhausted claim.

First, in § 1997e(c), Congress ordered dismissal of *certain* defective suits and claims – namely, those that are "frivolous, malicious, fail[] to state a claim upon which relief can be granted, or seek[] monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c)(1), "but *did not* include mixed actions among those actions that must be dismissed. *Lira*, 427 F.3d at 1171 (emphasis added); *see also Ortiz*, 380 F.3d at 657 ("Section 1997e(c) * * * the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required[,] is silent on the issue."). This omission establishes that "no special rule regarding the treatment of mixed complaints was intended." *Lira*, 427 F.3d at 1172.

Second, § 1997e(c)(2)'s reference to dismissal of a "claim" for failure to exhaust, juxtaposed to § 1997e(c)(1)'s reference to dismissal of an "action," "indicates that unexhausted claims can be treated independently, for dismissal purposes, from the action as a whole. *Id.* Indeed, "[t]here would be little point in providing for the dismissal of some nonexhausted claims on the merits if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed claims." *Id.*

Third, interpreting the word "action" in § 1997e(a) and (c)(1) to indicate that an exhaustion defect in any claim infects the suit as a whole "would 'render[] subsection (c)(2) superfluous.'" *Id.* (quoting *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part)). If § 1997e(a) demands a "total exhaustion" dismissal rule because it uses the word "action," then § 1997e(c)(1), because it uses the word "action," must also require dismissal of the entire case if any claim is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." "Yet, § 1997e(c)(1) must apply only when *all* the claims meet the statutory standard for summary dismissal on the merits, not when only some of them do." *Id.*; *see also Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part). Otherwise, § 1997e(c)(2), which contemplates the dismissal of individual frivolous "claims," would be "unnecessary." *Lira*, 427 F.3d at 1172. In other words, "the inclusion of a single frivolous claim would contaminate the entire action, mandating dismissal under § 1997e(c)(1)." *Id.* To read § 1997e(c)(1)'s use of the word "action" as precluding dismissal of individual defective claims would therefore clash with the "rule against superfluities" in statutory construction. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

In sum, the use of the term "action" elsewhere in the PLRA does not support interpreting § 1997e(a) as dictating a "total exhaustion" dismissal rule. "To the contrary, while 'action' in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing the entire action only if the entire action fails to meet statutory standards." *Lira*, 427 F.3d at 1173. When some claims are valid and others are not, the usual procedural norm – that when a complaint has both good and bad claims, only the bad claims are dismissed – should prevail.

Respondents assert that "requiring total exhaustion is consistent with this Court's habeas corpus jurisprudence." BIO at 11. Drawing a parallel between the PLRA and habeas corpus law is unnecessary because, when the PLRA's text and structure are properly considered, there is no need to analogize to habeas corpus jurisprudence. *See Lira*, 427 F.3d at 1173. This Court's decision mandating "total

exhaustion" in the habeas context – *Rose* v. *Lundy*, 455 U.S. 509 (1982) – did so exclusively for policy reasons because the applicable habeas statute was uninformative. *See id.* at 516-17 (analyzing the "policies underlying the statutory provision to determine its proper scope" when the text found to be ambiguous). But where the statutory language and structure answer an interpretation question, resorting to policy evaluation is inappropriate. *See Alexander* v. *Sandoval*, 532 U.S. 275, 286-87 (2001) (noting that "[s]tatutory intent * * * is determinative" and that it will not be disregarded "no matter how desirable that might be as a policy matter"). Moreover, even if this Court were to consider its habeas jurisprudence, it would be unhelpful. First, *Rose* does not require dismissal of an entire habeas action without leave to amend, as the court of appeals in these PLRA cases did. *Rose* expressly held that a habeas petitioner "can always amend the petition to delete unexhausted claims." *Rose*, 455 U.S. at 520. Additionally, this Court's decision in *Rhines* v. *Weber*, 125 S. Ct. 1528 (2005), modified the *Rose* rule to allow district courts to stay habeas petitions containing both exhausted and unexhausted claims to allow petitioners to exhaust their unexhausted claims in state court without having to re-file and face a possible statute of limitations bar. *See id.* at 1535. Thus, respondents' habeas analogy "does not support the inflexible total exhaustion-dismissal rule" that the court of appeals applied. *Lira*, 427 F.3d at 1173 n.10.

Respondents also assert that "the total exhaustion rule is consistent with the overall policy of the PLRA." BIO at 11. Even if this Court were to take policy considerations into account – which it should not – such considerations support *rejection* – rather than endorsement – of the Sixth Circuit's "total exhaustion" rule. As this Court identified, and as respondents properly note, *see* BIO at 11, "Congress enacted [PLRA] § 1997e(a) to reduce the quantity and improve the quality of prisoner suits" by filtering out frivolous claims, satisfying some grievances, and developing an administrative record for use in cases that go forward. *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Respondents argue that the Sixth Circuit's "total exhaustion" rule satisfies this policy objective in three ways, none of which are persuasive.

First, respondents argue that "[a]bsent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process." BIO at 12. This argument founders on its premise. District courts are not required under the PLRA to screen prisoner complaints for non-exhaustion. Indeed, as noted above, *supra* at pp. 9 & 11, the PLRA's pre-screening provision allows a district court to dismiss a prisoner's civil rights complaint only "if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(1). Nowhere in the PLRA did Congress specify that a court may dismiss a PLRA claim for failure to properly exhaust.

Second, respondents argue that the "total exhaustion rule avoids piecemeal litigation." BIO at 13. This argument ignores the reality that some "prisoner[s] who ha[ve] filed an improper mixed complaint can * * * refile, including only the properly exhausted claims, while exhausting the remaining claims and filing another suit later."[12] *Lira*, 427 F.3d at 1174 (citing *Jones Bey*, 407 F.3d at 811-12 (Clay, J., concurring in part and dissenting in part); *Ortiz*, 380 F.3d at 658). This would promote the precise inefficiency and waste of judicial resources – namely, requiring district courts to docket, assign, and process two cases where one would suffice – that the PLRA was designed to prevent. *See id.*

Finally, respondents argue that "the total exhaustion rule * * * encourag[es] prisoners and prison officials to make full use of the prison grievance procedure * * * aids the Federal courts by ensuring that there is a full administrative record to review for each of the prisoner's claims." BIO at 13-14.

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[12] Unlike habeas corpus cases, *see* 28 U.S.C. § 2244(b); *see also Mayle v. Felix*, 125 S. Ct. 2562, 2570 (2005) (recognizing that "federal habeas claims, by their very nature, challenge the constitutionality of a [single] conviction or sentence"), there is no preclusion to filing more than one PLRA suit. Additionally, PLRA claims joined into a single action may concern entirely independent underlying factual bases – as is the case with petitioner Williams' complaint – such that ordinary claim preclusion doctrines would not bar a subsequent suit. "Which claims are joined in a given PLRA lawsuit * * * is entirely up to the plaintiff. As a result, the goal of avoiding piecemeal litigation is far less achievable than in the habeas context, where a single conviction is at issue and severe restrictions on second and successive petitions ordinarily require that all challenges to that conviction be joined in a single [habeas] petition." *Lira*, 427 F.3d at 1174 (citing 28 U.S.C. § 2244(b)).

Crucially, however, the "total exhaustion" rule adopted by the Sixth Circuit and urged by respondents here makes little sense in the context of prison condition suits because a PLRA plaintiff's claims may have little to do with each other – temporally or substantively – as is the case here. *See Lira*, 427 F.3d at 1174 ("[E]xhausting one of these causes of action would not help satisfy the plaintiff, weed out frivolous complaints, or develop an administrative record with respect to the other [claims], entirely separate matters."). Moreover, under the Sixth Circuit's "total exhaustion" rule, both petitioner's deliberate indifference and First Amendment retaliation claims were dismissed, even though respondents conceded, *see* Pet. App. at 32a, that petitioner exhausted his retaliation claim against respondent Opanasenko and none of the lower courts found that petitioner actually failed to exhaust his deliberate indifference claims,[13] *see* Pet. at 15-16. Dismissing both sets of petitioner's claims will do nothing to assist the lower courts in addressing them because petitioner's claims were actually exhausted, a full administrative record was developed, and petitioner provided the district court proof of exhaustion with his opposition to respondents' motion to dismiss. *See* Pet. App. at 16a.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioner's supplemental brief, and the *amici* brief of D.C. Prisoners' Legal Services Project Inc. *et al.*, certiorari should be granted.

Respectfully submitted,

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February 23, 2006

[13] As noted in the petition, *see* Pet. at 15-16, and above, *supra* at p. 6, the district court dismissed petitioner's deliberate indifference claims against respondents Bock and Chaplin and defendants Konkle and Aldabaugh for failure to state a claim and against respondents Morrison and Opanasenko for failure to attach proof of exhaustion to his complaint. *See also* Pet. App. at 5a-6a, 14a.

APPENDIX

A. District Court Cases Applying the "Total Exhaustion" Rule to Dismiss Entire Prisoner Actions – October 13, 2005, to February 16, 2006

Adams v. Paquet, No. 2:05-CV-260, 2005 WL 3371853, *2 (W.D. Mich. Dec. 12, 2005)

Alexander v. Williams, No. 1:05-CV-663, 2005 WL 3072017, *2 (W.D. Mich. Nov. 16, 2005)

Annabel v. Eyke, No. 2:05-CV-209, 2005 WL 2758077, *2 (W.D. Mich. Oct. 25, 2005)

Anthony v. Hill, No. 2:06-CV-9, 2006 WL 357792, *2 (W.D. Mich. Feb. 15, 2006)

Baggett v. Smith, No. 1:05-CV-804, 2006 WL 13023, *2 (W.D. Mich. Jan 3, 2006)

Bentley v. Beckstrom, No. Civ.A. 06CV07HRW, 2006 WL 149016, *2 (E.D. Ky. Jan. 18, 2006);

Brintley v. Corrections Medical Services, No. 02-CV-11, 2006 WL 357794, *2 (W.D. Mich. Feb. 15, 2006)

Briscoe v. Anderson, No. 1:05CV2429, 2006 WL 144115, *3 (N.D. Ohio Jan.17, 2006)

Campbell v. Trevino, No. 1:05-CV-748, 2006 WL 357050, *2 (W.D. Mich. Feb. 15, 2006)

Colston v. Lindsey, No. 2:05-CV-282, No. 2006 WL 335669, *2 (W.D. Mich. Feb. 13, 2006)

Courtney v. Caruso, No. 4:05-CV-83, 2005 WL 2671283, *2 (W.D. Mich. Oct. 19, 2005)

Daily v. Blackford, No. 2:05-CV-253, 2006 WL 15429,*2 (W.D. Mich. Jan. 4, 2006)

Diaz v. Rutter, No. 2:05-CV-239, 2005 WL 3262440, *4 (W.D. Mich. Nov. 30, 2005)

Duerson v. Henderson County Det. Ctr., No. Civ.A. 405CVP165M, 2005 WL 3134049, *2 (W.D. Ky. Nov. 23, 2005)

Ellibee v. Sebelius, No. 04-3403-JAR, 2005 WL 3503483, *5 (D. Kan. Dec. 22, 2005)

El-Shabazz v. Dunn, No. 2:05-CV-17, 2006 WL 335659, *4 (W.D. Mich. Feb. 13, 2006)

Grasty v. Samuels, No. Civ.A. 05CV484KKC, 2005 WL 2708410, *2-*3 (E.D. Ky. Oct. 21, 2005)

Harnage v. Swanson, No. 05-3098-JTM, 2006 WL 269974, *11 (D. Kan. Feb. 3, 2006)

Harris v. Edlund, No. 2:05-CV-270, 2006 WL 250699, *1-*2 (W.D. Mich. Feb 1, 2006)

Harris v. Healy, No. 2:05-CV-247, 2006 WL 250628, *2 (W.D. Mich. Feb. 1, 2006)

Harris v. Hoover, No. 2:05-CV-269, 2006 WL 15404, *2 (W.D. Mich. Jan. 4, 2006)

Jennings v. Bergh, No. 2:06-CV-1, 2006 WL 357666, *1 (W.D. Mich. Feb. 15, 2006)

Kitchen-Bey v. Michigan Dep't of Corr., No. 2:05 CV 267, 2006 WL 62827, *3 (W.D. Mich. Jan. 10, 2006)

McKaye v. Naples, No. 2:05-CV-244, 2005 WL 3262443, *2 (W.D. Mich. Dec. 1, 2005)

Owens v. Simon, No. 1:05-CV-733, *3 2005 WL 3107732, *3 (W.D. Mich. Nov. 21, 2005)

Payne v. Hofbauer, No. 2:05-CV-245, 2005 WL 3371443, *1 (W.D. Mich. Dec. 12, 2005)

Rand v. Antonini, No. Civ.A. 05-CV-70969, 2005 WL 3163390, *1, *3-*4 (E.D. Mich. Nov. 28, 2005)

Rector v. Morgan, No. 3:05-CV-192, 2005 WL 3465680, *1-*2 (E.D. Tenn. Dec. 19, 2005)

Reynolds v. Harris-Spicer, No. 1:05-CV-527, 2005 WL 2990486, *4 (W.D. Mich. Nov. 8, 2005)

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Swanchara v. Falbo, No. 2:05-CV-238, 2005 WL 2978892, *2-*3 (W.D. Mich. Nov. 7, 2005)

Torrez v. McKee, No. 1:05-CV-785, 2005 WL 3535058, *2 (W.D. Mich. Dec. 22, 2005)

Vartinelli v. Moskalik, No. 1:03-CV-323, 2006 WL 314448, *2 (W.D. Mich. Feb 9, 2006)

B. District Court Cases Refusing to Apply the "Total Exhaustion" Rule to Dismiss Entire Prisoner Actions – October 13, 2005, to February 16, 2006

Beltran v. O'Mara, 405 F. Supp. 2d 140, 157-59 (D.N.H. 2005)

Burgess v. Pliler, No. S-03-0643 GEB GGH P, 2006 WL 278588, *7 (E.D. Cal. Feb. 3, 2006)

Campbell v. Chaves, 402 F. Supp. 2d 1101, 1108-09 (D. Ariz. 2005)

Copenhaver v. Hammer, No. 1:05-CV-675, 2005 WL 2899673, *3 (W.D. Mich. Nov. 3, 2005)

Mullicane v. Marshall, No. F 03 6299 AWILJO P, 2005 WL 3299079, *2 (E.D. Cal. Dec. 1, 2005)

Porter v. Caruso, No. 1:05-CV-562, 2005 WL 2679785, *3-*4 (W.D. Mich. Oct. 20, 2005)

Shabazz v. Martin, No. 00CV73005DT, 2006 WL 305673, *2-*3 (E.D. Mich. Feb. 9, 2006)

Shavers v. McKee, No. 1:06 CV 40, 2006 WL 322482, *3 (W.D. Mich. Feb. 10, 2006)

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